

IN THE

51

**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT

C. D. BELL,

*Appellant,*

*vs.*

APACHE MAID CATTLE COMPANY, a Corpora-  
tion, BABBITT BROTHERS TRADING COM-  
PANY, a Corporation, THE ARIZONA LIVE-  
STOCK LOAN COMPANY, a Corporation,  
and H. V. WATSON,

*Appellees.*

**APPELLANT'S BRIEF**

NORRIS & PATTERSON,  
W. E. PATTERSON,

STROUSS & SALMON,  
CHARLES L. STROUSS,  
RINEY B. SALMON,

*Attorneys for Appellant.*





IN THE  
**United States Circuit Court**  
**of Appeals**  
FOR THE NINTH CIRCUIT

---

C. D. BELL,

*Appellant,*

*vs.*

APACHE MAID CATTLE COMPANY, a Corpora-  
tion, BABBITT BROTHERS TRADING COM-  
PANY, a Corporation, THE ARIZONA LIVE-  
STOCK LOAN COMPANY, a Corporation,  
and H. V. WATSON,

*Appellees.*

---

APPELLANT'S BRIEF

---

NORRIS & PATTERSON,  
W. E. PATTERSON,

STROUSS & SALMON,  
CHARLES L. STROUSS,  
RINEY B. SALMON,

*Attorneys for Appellant.*

---

---



## TABLE OF CONTENTS

	Pages
Jurisdiction .....	1
Statement of the Case .....	2
Assignments of Error .....	5
Summary of Arguments .....	5
Argument .....	6
Proposition I. The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged .....	7
Proposition II. If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side and not dismissed .....	12
Appendix .....	16

# TABLE OF CASES AND AUTHORITIES CITED

Pages

## A.

Alsop v. Riker, 155 U. S. 461; 39 L. Ed. 218.....	10
American Law Reports, Vol. 65, p. 39 .....	12

## D.

Day v. Chism, 10 Wheat 449; 6 L. Ed. 363 .....	13
Diamond Alkali Co. v. Tomson & Co., 35 Fed. 2d 117	14

## E.

Equity Rule 22 (28 U. S. C. 723) .....	13
--	----

## G.

Gallihier v. Caldwell, 145 U. S. 368; 36 L. Ed. 214.....	10
--	----

## H.

Humphreys v. Walsh, 248 Fed. 414 .....	10
--	----

## J.

Judicial Code, Section 247a (28 U. S. C. 397) .....	13
---	----

## K.

Kelley v. United States, 30 Fed. 2d 193 .....	14
---	----

## L.

Loring v. Palmer, 118 U. S. 321; 30 L. Ed. 211 .....	10
--	----

## M.

McClurg v. Crawford, 209 Fed. 340 .....	12
---	----

## N:

National Forest Regulations .....	24, 25
-----------------------------------	--------

## P.

Patterson v. Hewitt, 195 U. S. 309; 49 L. Ed. 214.....	10
Pierce v. Nat. Bk: of Commerce, 268 Fed. 487 .....	14

## T.

Townsend v. Vanderwerkes, 160 U. S. 171; 40 L. Ed. 383 .....	10
---	----

# TABLE OF CASES AND AUTHORITIES CITED

(Continued)

	Pages
U.	
United States Code, Title 28, Section 41.....	1
Title 28, Section 397.....	13
Title 28, Section 723.....	13
W.	
Wilhite v. Skelton, 149 Fed. 67 .....	12

---

## INDEX TO APPENDIX

Excerpts from National Forest Regulations.

	Pages
Grazing .....	16
Regulation G- 1—Authorization .....	18
Regulation G- 2—Applications and Permits .....	18
Instructions and Procedure ...	19
Action on Application After	
Final Date .....	20
Method of Approving .....	20
Regulation G- 7—Preferences .....	21
Instruction and Procedure .....	22
Reductions .....	22
Regulation G- 9—Permits to Purchasers .....	24
Instructions and Procedure ...	25
Purpose of Regulation .....	25
Regulation G-10—Grazing Fees .....	28
Regulation G-11—Payments and Refunds .....	29
Counting Stock .....	33
Handling Stock .....	35





IN THE  
**United States Circuit Court  
of Appeals**  
FOR THE NINTH CIRCUIT

---

C. D. BELL,

*Appellant,*

*vs.*

APACHE MAID CATTLE COMPANY, a Corpora-  
tion, BABBITT BROTHERS TRADING COM-  
PANY, a Corporation, THE ARIZONA LIVE-  
STOCK LOAN COMPANY, a Corporation,  
and H. V. WATSON,

*Appellees.*

---

**APPELLANT'S BRIEF**

---

**JURISDICTION**

Jurisdiction in the District Court was based on diversity of citizenship and an amount in controversy, exclusive of interest and costs, exceeding the sum of \$3,000.

The statutory provision believed to sustain the jurisdiction in the District Court is Section 41, Title 28, United States Code.

The pleadings necessary to show the existence of the jurisdiction are paragraphs I and II of the Bill of Complaint which appear at pages 6 and 7 of the Transcript of Record.

Jurisdiction in the United States Circuit Court of Appeals for the Ninth Circuit is based upon the provisions of the United States Code prescribing the appellate jurisdiction of Circuit Courts and the pleadings transferring the cause to this Court for review.

The statutory provision believed to sustain the jurisdiction in the United States Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28, United States Code.

The pleadings necessary to show the existence of the jurisdiction and the pages where such pleadings appear in the Transcript of Record are:

Pleading	Transcript of Record Page
Notice of Appeal .....	21
Petition for Appeal .....	21
Assignments of Error .....	22
Order Allowing Appeal .....	24
Bond on Appeal .....	25
Praeceptum for Transcript of Record .....	27
Citation on Appeal .....	30

---

## STATEMENT OF THE CASE

The appellant, with leave of Court first granted, filed his Amended Bill of Complaint. The appellees moved

to dismiss the amended bill of complaint upon the grounds that (a) the amended bill did not state facts sufficient to constitute a cause of action at law or in equity, (b) the amended bill was wholly without equity, (c) the amended bill does not state facts sufficient to entitle plaintiff to relief by way of specific performance of the contract alleged, (d) the amended bill does not state facts sufficient to entitle plaintiff to any relief, (e) it appears from the face of the amended bill that the contract alleged as the basis of the action is illegal and void, and (f) it appears from the face of the amended bill that the cause of action is stale.

The appellees' motion to dismiss the Amended Bill was granted by the Court below and a decree was entered dismissing the Amended Bill of Complaint. From this decree the appeal is taken.

Other than those showing jurisdiction, the material allegations of the amended bill are:

Prior to January 31, 1931, the appellant was the owner of certain real property adjacent to, and certain improvements on, the Coconino National Forest in Coconino and Yavapai Counties, Arizona, and was the owner of forty head of cattle ranging and running on said National Forest under permits from the United States Forestry Service.

That at this time the appellees were the owners of 283 acres of patented land adjacent to and improvements on, said National Forest, and possessed the right under permits from the United States Forestry Service to graze 3174 head of cattle on said National Forest.

On or about January 31, 1931, the appellant entered into an agreement with the appellees whereby the appellees agreed to sell and transfer to the appellant the 283 acres of patented land, 960 head of cattle, and appellees' said improvement on the National Forest, and agreed to relinquish to the appellant sufficient grazing rights for the appellant to graze, run and maintain not less than 960 head of cattle throughout the year. In consideration thereof the appellant agreed to, and did, pay to the appellees the sum of \$22,890.

The appellees conveyed the said patented land and improvements and transferred the 960 head of cattle to the appellant, and pretended to relinquish grazing rights sufficient to graze and maintain not less than 960 head of cattle throughout the year. In truth the grazing right relinquished by appellees to appellant was sufficient to graze and maintain only 640 head of cattle throughout the year and not 960 head of cattle as appellees had contracted, because prior to the agreement of on or about January 31, 1931, the appellees were notified by the United States Forestry Service that, because of overgrazing conditions in the National Forest, the appellees were required to reduce the number of cattle they were permitted to graze under their permits. Such reduction or relinquishment by the appellees to the government was necessary and effective before any relinquishment could be made to appellant. The appellees concealed this matter from the appellant. It was not until October, 1933, that the appellant discovered that the relinquishment to him amounted in fact to rights suffi-

cient to range only 640 head of cattle, and not 960 head. That the appellant had expended money for fence, the development of water and for other improvements and by reason of the appellees' failure to relinquish range sufficient to graze and maintain 960 head of cattle he had suffered damage in the amount of \$5,120. That the appellant had no plain, speedy and adequate remedy at law.

---

### ASSIGNMENTS OF ERROR

The first and second assignments of error appearing at pages 22 and 23 of the transcript of record will be relied upon by the appellant. Since the legal questions presented by the two assignments of error are identical they will be argued together.

---

### SUMMARY OF ARGUMENT

Our argument will be presented under the following propositions:

1. The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged.

2. If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side, and not dismissed.

## ARGUMENT

## ASSIGNMENT OF ERROR

First. The Court erred in granting the motion of the defendants, Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, and H. V. Watson, and each of them, to dismiss the amended complaint herein for the reasons (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

Second. The Court erred in entering a decree in favor of the defendants Apache Maid Cattle Company, a corporation, Babbitt Brothers Trading Company, a corporation, The Arizona Livestock Loan Company, a corporation, H. V. Watson, and each of them, and against the plaintiff for the reason (a) that said amended complaint alleges facts sufficient to constitute a cause of action against said defendants, and each of them, within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the plaintiff to relief by a decree for the specific performance of a contract, (b) that, if said amended bill is insufficient to give equity jurisdiction,

a cause of action at law is stated requiring the cause to be transferred to the law side of the Court.

---

### PROPOSITION I.

**The Amended Bill of Complaint states a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged.**

The amended bill of complaint, after alleging matters of inducement to the contract, sets forth a contract, partly oral and partly in writing, consummated between the parties on or about the 31st day of January, 1931. It is alleged that the appellees agreed to sell and transfer to the appellant the 283 acres of patented land adjacent to the Coconino National Forest, 960 head of cattle, and certain improvements on said Coconino National Forest, and to relinquish to appellant, from the grazing rights held by the appellees on said Coconino National Forest, sufficient grazing rights to permit the appellant to graze throughout the year 960 head of cattle; and that the appellant agreed to purchase the same and pay to the appellees the sum of \$22,890. It is alleged that the contract has been fully performed on the part of the appellant, and all provisions thereof to be performed by the appellees have been performed except the agreement by appellees to relinquish to the appellant sufficient range to graze 960 head of cattle, but appellees have relinquished only sufficient range to graze 640 head of cattle. The appellant asks that a decree of specific performance requiring the appellees

to relinquish additional range sufficient to graze 320 head of cattle. It is then only with that part of the contract for the relinquishment of range rights, and the appellees failure to perform the same, that we are here concerned.

The amended bill of complaint alleges that the appellees had the right under permits from the National Forestry Service to run 3174 head of cattle on the Coconino National Forest; that the appellees contracted and agreed with appellant to relinquish to appellant sufficient of such rights to allow appellant to graze 960 head of cattle throughout the year on such National Forest; that appellant has fully performed the obligations and agreements on his part to be performed but appellees have failed and refused to relinquish rights sufficient to graze more than 640 cattle on said National Forest.

Thus a plain legal and valid contract is alleged. A contract for the relinquishment of range rights as a part of a bona fide business transaction is legal and valid. Regulation G-9 provides that permits will be forfeited if sold or transferred for a valuable consideration. (Appendix page 24.) However, as will be seen from the instructions and procedure which accompanies the regulation it is not intended to prohibit the transfer of permits by relinquishment as a part of a bona fide business transaction, but only to prohibit bartering in permits as a separate right or property. (Appendix, page 25.) In fact, the regulation anticipates and permits the transfer of the permit by relinquishment in a



bona fide transaction of the character alleged in the complaint.

Nor need a decree for specific performance herein be directed to nor include a third party (Forestry Service) not a party to the contract because these provisions of the regulations (Instructions and Procedure, Appendix page 25) expressly provide for the transfer of the permit to the purchaser of a relinquishment in a bona fide transaction of the character here alleged.

There is no uncertainty as to the subject matter of the amended bill of complaint. It is alleged that the appellees owned grazing rights or permits sufficient to permit the grazing of 3174 head of cattle on the Coconino National Forest, and agreed to sell and transfer to appellant sufficient of *these rights and permits* to allow appellant to graze 960 head of cattle on said Coconino National Forest. It clearly appears that the rights which appellees contracted to sell and transfer to appellant were from these range rights of appellees in Coconino National Forest.

The complaint alleges that the appellant did not know or discover until October, 1933, that the appellees had failed to transfer to him relinquishments sufficient to allow him to graze 960 head of cattle and that he immediately demanded, and has since demanded of appellees that they relinquish to him additional range rights sufficient to graze an additional 320 head and appellees have refused so to do. The amended bill of complaint discloses that appellant acted promptly upon discovering the facts. There can be no laches.

The delay in discovering the breach is shown to have been due to the concealment by the appellees from appellant of the matters and facts concerning the notice to appellees by the Forestry Service that the range rights were reduced.

“Laches in legal significance is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful. It is such delay as involves the inequity of permitting a claim to be asserted after the death of parties, change of title, intervention of the rights of others, where, in consequence, evidence has been lost or has become obscured, the discovery of the truth is made difficult, and the party attacked is placed in a position of evident disadvantage.”

*Humphreys v. Walsh*, 248 Fed. 414, 419.

And see:

*Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214;

*Galliher v. Caldwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 214;

*Alsop v. Riker*, 155 U. S. 461, 15 Sup. Ct. 162, 39 L. Ed. 218.

A defendant cannot take advantage of a delay caused or contributed to by his concealment.

*Townsend v. Vanderwerkes*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383;

*Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. 1073, 30 L. Ed. 211.

The contract was consummated on or about January 31, 1931. It does not appear, however, when it was to be performed or when the breach occurred. It is alleged that the breach was not discovered until October, 1933. It does not therefore appear from the allegations of the complaint that any applicable statute of limitations has run.

And we submit that as against a Motion to Dismiss the allegations of the amended bill of complaint sufficiently show the remedy at law is inadequate. In paragraph XII of the amended bill (trans. p. 12) it is directly alleged that there is no plain, speedy or adequate remedy at law. In addition we submit that it clearly appears from the allegations of the amended bill that the range rights which were the subject matter of the agreement, covered an area adjacent to, not only the patented property and the improvements on the Cocoino National Forest already owned by appellant but likewise adjacent to the patented land and improvements on such National Forest purchased by appellant from the appellees as a part of this contract, and that relying on appellees agreement to transfer grazing rights sufficient to graze 960 head of cattle appellant had made other improvements on such National Forest. The subject matter of this agreement was not personal property, which upon failure to deliver can be duplicated, but a right or interest in realty. In equity it is assumed with respect to contracts involving land or rights in land that the purchaser contracted for the particular subject matter of the contract, and hence

that a recovery of damages for breach of the contract will not constitute an adequate remedy.

*Wilhite v. Skelton*, 149 Fed. 67;

*McClurg v. Crawford*, 209 Fed. 340;

*Annotation*, 65 A. L. R. 39 et seq.

We respectfully submit that the amended bill of complaint states a cause of action in equity entitling the appellant to relief by way of specific performance, and that the order and decree of the court below granting the motion of the appellees to dismiss the action, and dismissing the action, should be reversed.

#### PROPOSITION II.

**If equity jurisdiction is wanting, the amended Bill of Complaint states a cause of action at law for damages for breach of contract and the cause should have been transferred to the law side and not dismissed.**

As pointed out in our argument under the preceding proposition the amended bill of complaint alleges a valid and legal contract whereby the appellees agreed to relinquish to the appellant range rights under the permits from the Forestry Service sufficient to permit the appellant to graze 960 head of cattle on the Coconino National Forest throughout the year. The allegations of the bill show an adequate consideration moving from the appellant to the appellees, and that such consideration has been paid to the appellees by appellant, and all conditions to be performed by the appellant have been performed. Demand by the appellant of the ap-

pellees that they relinquish to appellant and that they perform the contract and the refusal by the appellees are alleged. The bill alleges the damage to the appellant by the appellees' failure to perform and prays that if specific performance cannot be decreed that appellant have judgment for his damages.

Every allegation necessary to a cause of action at law for damages is set forth in the amended bill of complaint.

*Day v. Chism*, 10 Wheat 449, 6 L. Ed. 363.

Equity Rule No. 22 (28 U. S. C. A. 723) provides:

“RULE 22. ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.”

And in Section 247a of the Judicial Code (28 U. S. C. A. 397) it is provided:

*“Amendments to pleadings.* In case any United States court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause

shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.”

In *Diamond Alkali Co. v. Tomson & Co.* (Third Circuit) 35 Fed. 2d 117, the action was in the nature of a bill for specific performance. The case was tried to the court in the District Court, which dismissed the bill for want of equity. The Circuit Court in reversing the decree held that, although the plaintiff had not moved that the cause should be transferred to the law side, and the trial court did not transfer it of his own motion, under Equity Rule 22 the Circuit Court would direct that it be transferred to the law side it appearing that the bill stated a cause of action for breach of contract.

In *Kelley v. United States*, 30 Fed. 2d. 193, 194, this Honorable Court quoted with approval from the decision of the Eighth Circuit Court in *Pierce v. National Bank of Commerce*, 268 Fed. 487, as follows:

“Did the complaint state facts sufficient to constitute a cause of action, either at law or in equity, for if it stated a cause of action at law, this case should have been transferred to the law side of the court, and there proceeded with. The fact that a complainant in equity has an adequate remedy at law is no longer sufficient ground for dismissal of the suit. Equity Rule 22. \* \* \*”

In *Pierce v. National Bank of Commerce*, supra, the plaintiff filed a bill of complaint for discovery and

accounting in relation to certain mortgage bonds, and applied for an interlocutory injunction. Defendant moved to dismiss the complain for failure to state a cause of action. The appeal was from the decree dismissing.

If the amended bill of complaint herein failed to state a cause of action in equity, it stated a cause of action at law for breach of contract and should have been transferred to the law side of the court.

We respectfully submit that the order and decree of the District Court dismissing the amended bill of complaint should be reversed.

Respectfully submitted,

NORRIS & PATTERSON,  
W. E. PATTERSON,  
First National Bank Bldg.,  
Prescott, Arizona,

STROUSS & SALMON,  
CHARLES L. STROUSS,  
RINEY B. SALMON,  
Title & Trust Building,  
Phoenix, Arizona,  
*Attorneys for Appellant.*

## APPENDIX

---

EXCERPTS FROM THE NATIONAL FOREST  
MANUAL REGULATIONS AND INSTRUCTIONS,  
UNITED STATES DEPARTMENT OF  
AGRICULTURE, FOREST SERVICE.

---

## GRAZING

The Secretary of Agriculture has authority to permit, regulate, or prohibit grazing in the national forests. Under his direction the Forest Service will allow the use of the forage crop as fully as the proper care and protection of the forests and water supply will permit. The cattle and sheep which are grazed in the national forests bear an important relation to the supply of beef and mutton in this country, and every effort will be made by forest officers to promote the fullest possible use of grazing resources. The utilization of forage grasses and plants also reduces the fire danger and helps protect the forests. In addition to national forests where the livestock industry is of special importance, existing grazing privileges will be continued at first, and if a reduction in number is afterwards found necessary stockmen will be given ample opportunity to adjust their business to the new conditions. Every effort will be made to distribute the stock on the range satisfactorily in order to secure greater harmony among the users of the forests, to reduce the waste of forage through unnecessary movements of stock, and to obtain a more permanent, judicious and profitable use of the range. The leading objects of the grazing regulations are:



1. The protection and conservative use of all national forest land adapted to grazing, under principles conforming to the natural conditions surrounding the forage resources.

2. The permanent good of the livestock industry through the proper care and improvement of the grazing lands, under principles conforming to the requirements of practical operation.

3. The protection of the settler and established ranch owner against unfair competition in the use of the range.

It is expected that the stock owners will earnestly cooperate in carrying out the regulations.

There is no law which gives an individual or corporation the right to graze stock upon national forest lands. The grazing of such lands may be allowed by the Secretary of Agriculture only as a personal privilege. This privilege is a temporary one allowable under the law when it does not interfere with timber production or watershed protection. It is transferable only within the limits and restrictions set forth in these regulations.

Stock owners have been suffered to graze their stock upon the public lands of the United States under certain conditions of occupancy, residence, and ownership of improved land or water rights. This use, continued, throughout a long period of years, has in the absence of congressional legislation become the accepted custom in many communities, even receiving the recognition of certain of the courts. It is allowed, however, only

by passive consent of the United States. By force of the presidential proclamation creating a national forest, such passive consent ceases and is superseded by definite regulations issued by the Secretary of Agriculture under the authority of Congress. Grazing stock upon the forests, except in accordance with these regulations, is trespass against the United States.

Permits will be issued to graze a certain number of livestock in each national forest, or part thereof, so long as no damage is done by such stock. A reduction will be made from the number of stock grazed during the previous season if, owing to the number grazed or the method of handling the stock, damage is being done to the forest, and in extreme cases all stock will be excluded.

Except as provided under the regulations, all grazing permits are issued upon a per capita charge.

#### AUTHORIZATION

Reg. G-1. The Secretary of Agriculture in his discretion will authorize the grazing of livestock upon the national forests under such rules and regulations as he may establish.

The Forester will prescribe the number and class of stock to be grazed on any national forest on which grazing has been authorized by the Secretary. \* \* \*

#### APPLICATIONS AND PERMITS

Reg. G-2. Every person must submit an application and secure a permit in accordance with these regulations before his stock can be allowed to graze on a na-

tional forest, except as hereinafter provided and unless otherwise authorized by the Secretary of Agriculture. The Forester may authorize the issuance of grazing permits for a term of years within a maximum of 10 years. A term permit shall have the full force and effect of a contract between the United States and the permittee. It shall not be reduced or modified except as may be specifically provided for in the permit itself and shall not be revoked or cancelled except for violation of its terms or by mutual agreement. The grazing regulations shall be considered as a part of every permit.

The few head of livestock in actual use by prospectors, campers, and travelers, or used in connection with permitted operations on a national forest, or not to exceed 10 head of milch, work, or other animals owned and used for domestic purposes by bona fide settlers residing within or contiguous to a national forest may be allowed to graze free, under such restrictions as the Forester may prescribe.

All stock grazed under paid permit on national forests must be actually owned by the permittee.

#### INSTRUCTIONS AND PROCEDURE

\* \* \*

#### *Application Should Be Complete*

All applications for grazing permits must be submitted on forms furnished by forest officers and the information necessary to complete the application must be furnished in detail. Forest officers should require that every question contained in applications forms

be answered by applicant, either affirmatively or negatively. The information required to complete the forms serves as a basis for the apportionment of grazing privileges and constitutes an essential record maintained by the Forest Service. All statements should be complete and should be checked and verified. \* \* \*

### *Action on Application After Final Date*

The application having been acted upon and the notices of approval forwarded no changes will be made to accommodate persons who failed to file their applications in time, unless their failure was caused by circumstances which, in the supervisor's opinion, warrant a readjustment of range allotments. Negligence or failure to exercise ordinary diligence will not be considered a satisfactory reason for the approval of an application after the date set.

In case the total number of any kind of stock applied for before the date which has been set does not equal the number authorized to graze on the forest, late, supplemental, or new applications may be approved at any time until this number has been reached.

### *Method of Approving Applications*

The supervisor will immediately notify the applicant of the approval of his application by a letter of transmittal (Form 861-G) showing the number of stock for which the application has been approved, the period, and the fees to be paid. Any unusual conditions may be noted on the form. Whenever an amendment or a correction is made, or a supplemental or temporary application is approved, the notice will be marked "Amended," "Corrected," "Supplemental," or "Temporary," etc. A duplicate of each Form 861-G issued

will be sent to the district forester at once and a triplicate filed in the supervisor's office.

Form 861-G for term permits will designate the year for which payment is to be made, thus: "Term permit, first year."

Applications may be amended, supplemented, temporarily cancelled, approved, or disapproved. \* \* \*

### PREFERENCES

Reg. G-7. For the purpose of contributing to the stability of the livestock industry and making the forage resources of the national forests of the greatest value, the Forester shall provide for the recognition of preferences in the use of national forest ranges and the renewing of permits, to an extent consistent with the prevention of monopoly and with the principle of a reasonable distribution of grazing privileges.

Persons who are full citizens of the United States shall be given preference in the use of national forest ranges over other persons.

The following classification of applicants for grazing privileges is hereby established:

Class A. Persons owning and residing upon improved ranch property which is dependent upon the national forest, and who are owners of not more than the established exemption limit number of stock, or the protective limit number in the absence of an exemption limit.

Class B. Prior users of national forest range who do not own improved ranch property, and persons owning such property who own stock in excess of the established exemption limit, or the protective limit in the absence of an exemption limit.

Class C. Persons who are not regular users of national forest range and who do not own improved ranch property. This class can not acquire an established preference in the use of national forest range.

## INSTRUCTIONS AND PROCEDURE

### *No Legal Rights in National Forest Range*

A preference may be acquired in the allotment of grazing privileges, but no legal right will accrue to the use of national forest range. This preference does not entitle the holder to continue use of a certain part of the forest but only to a preference over other applicants less entitled to consideration in the use of the range open to a given class of stock.

### *"Preferences" and "Permits"*

A grazing preference entitles the holder thereof to special consideration over other applicants, but to no consideration as against the Government. The holder of the preference is a preferred applicant. Grazing preferences run on year after year indefinitely until canceled or revoked. A grazing permit is a document authorizing the grazing of livestock under specific conditions. It expires at a certain stated date. The terms "preference" and "permit" are not synonymous, and care should be exercised in their use. \* \* \*

## REDUCTIONS

### *Purposes*

Reductions on grazing preferences are made for two purposes: Protection and distribution. Protection reductions may be made at the close of any grazing season

in any amount the circumstances justify. Reductions for distribution in any year on annual permits above the protective or exemption limits shall not, together with reductions for protection, exceed 10 per cent in the case of commensurate ranch property, or 20 per cent in the absence of such property. The 10 and 20 per cent reductions may be applied entirely for distribution.

Distribution may be defined as the granting of preference to qualified new class A applicants and increasing preferences of qualified class A permittees below the protective or exemption limit.

#### *Reductions—How Applied*

When reductions are necessary, temporary permits will be terminated first. If this is insufficient, reductions on a flat-rate basis for distribution may be made on preferences above the exemption limit, or in the absence of an exemption limit on preferences above the protective limit. Protection reductions may be made on any preference, but as far as practicable they will be applied only on preferences above the exemption limit or above the protective limit in the absence of an exemption limit.

Any preference resulting from the division of an outfit during the preceding grazing season may be reduced as though the outfit had not been divided.

Necessary reductions on a flat-rate basis for protection may be made in term permits at the end of any grazing year during the term-permit period. During the term-permit period, a reduction may be made for dis-

tribution which, taken together with all reductions made for protection during the period, does not exceed 10 per cent.

If during any year, the reductions made on established preferences are not used or needed for the purposes for which they were made, the original preferences will be considered the following year as if no reduction had been made.

Each term permit shall specify the maximum cut that can be made for distribution, which shall not exceed 10 per cent, and the maximum cut that may be made for all purposes, including protection, which shall be established in accordance with local range conditions. The possible reduction for range protection during the term-permit period should be not less than 10 per cent unless this requirement is waived by the district forester. The district forester may in his discretion, when local range conditions require, restrict permits to an annual basis. \* \* \*

#### PERMITS TO PURCHASERS

Reg. G-9. To facilitate legitimate business transactions, under conditions specified by the Forester, and unless otherwise authorized or limited by the Secretary of Agriculture, and upon satisfactory evidence being submitted that the sale is bona fide, a purchaser of either the permitted stock or the dependent, commensurate ranch property of an established permittee will be allowed a renewal of permit in whole or in part, subject to the maximum limit restrictions, provided the purchaser of stock only, actually owns dependent, com-



mensurate ranch property, and the person from whom the purchase is made waives to the Government his preference for renewal of permit. A renewal of permit on account of purchase from a grantee who has used the range less than three years will not be allowed.

A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration.

## INSTRUCTIONS AND PROCEDURE

### *Purpose of the Regulation*

Regulation G-9 provides for administrative control in connection with business transactions involving grazing privileges between persons, companies, or corporations whose enterprises are dependent in whole or in part upon the use of national forest range. The regulation has been so framed as to permit as much freedom of action as possible in such matters consistent with good administration.

### *Proof of Validity of Transfer*

Before any consideration will be given an application for renewal of permit on account of purchase, satisfactory evidence must be submitted to the forest supervisor that the sale is bona fide.

A statement should be submitted showing the character, location, and amount of ranch property upon which the application for renewal is based and the connection it has with the stock.

Title to the stock or land involved must pass directly from the person executing the waiver to the purchaser applying for the permit.

### *Waiver of Preference*

A waiver of preference (Form 763) will be required in all cases where the original permittee desires to relinquish claim to a renewal of permit.

### *Free Permits to Purchasers*

In case a permittee sells during the permit period and consents to the purchaser's continuing to graze the stock on the national forest, upon presentation to the supervisor of evidence that the sale is bona fide, the original permit will be canceled and a new permit issued to the purchaser without charge for the remainder of the period for which fees have been paid. If only a portion of the stock is sold, an amended permit for the number of stock retained will be issued to the original permittee, and a free permit to the purchaser for the number purchased. No transfer of fees on the record is necessary in such cases. Cross reference entries will be made on the record cards.

### *Sale of Stock After Approval of Application*

When stock is sold after the application for a grazing permit has been approved and prior to the beginning of the grazing period, if the permittee does not waive his grazing preference although willing to forego use of the range for the current season, the original application will be cancelled and the application of the purchaser will be approved upon its merits as a new applicant, subject to the regulations.

### *Ranch Property*

Ranch property must be fully commensurate and dependent and conform to the definition of ranch property under the instructions of Regulation G-9.

### *Purchase of Stock and Ranches*

If the ranch property is commensurate, dependent, and used in connection with the permitted stock, the purchaser of both the stock and ranches of a permittee will be allowed a renewal of permit for the permittee's established grazing preference, subject to the maximum limit restrictions and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 10 per cent may be made. If the ranch property is not fully commensurate, a proportionate reduction should be made in the number of stock for which renewal of permit is allowed.

### *Purchase of Stock Only by Owner of Improved Ranch*

A purchaser of permitted stock who owns improved ranch property, dependent and commensurate and used in connection with the stock, or who acquires such ranch property from persons other than the original permittee, will be allowed a renewal of permit for the permittee's established grazing preference, provided that the maximum limit restriction is not exceeded and a waiver from the original permittee is filed with the application for renewal. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made.

*Purchase of Ranch Property Only*

One who purchases from the permittee commensurate dependent ranch property without the permitted livestock will be allowed a renewal of permit for the preference waived, subject to the maximum limit and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made.

*Leased Land Not Acceptable*

The applicant for renewal must hold legal title to the lands, as leased lands do not meet the requirements of the regulations. \* \* \*

## GRAZING FEES

Reg. G-10. A fee will be charged for the grazing of all livestock on national forests, except as provided by regulation, or unless otherwise authorized by the Secretary of Agriculture, or in cases where the forester may determine it is to the interest of the United States to permit free grazing

The forester is authorized to determine the fair compensation to be charged for the grazing of livestock on the national forests, upon the basis of the following factors:

- (1) A proper use of the grazing resource to best serve the public interest.
- (2) Reasonable consideration of the value of the forage to the livestock industry.
- (3) Effect of the rates upon the livestock producers.

An additional charge of a 2 cents per head will be made for sheep or goats which are allowed to enter the national forests for the purpose of lambing or kidding.

No charge will be made for animals under six months of age at the time of entering the forest, which are the natural increase of stock upon which fees are paid or for those born during the season for which the permit is allowed. \* \* \*

#### PAYMENTS AND REFUNDS

Reg. G-11. All grazing fees are payable in advance of the grazing period, unless otherwise authorized by the Forester. Crossing fees are payable in advance of entering the national forest.

When an applicant is notified that his application has been approved, he will remit the amount due for the privilege to the designated United States depository. Persons who fail to pay the fees as above specified must notify the proper forest officer and give satisfactory reasons. Failure to comply with the above provisions may be sufficient cause for denying a grazing or crossing permit.

When a permittee is prevented from using the forest by circumstances over which he has no control or for some justifiable cause does not use the privilege granted him, in the discretion of the district forester a refund of the fees paid will be made in whole or in part as the circumstances may justify and the Government's interests will permit. \* \* \*

## GRAZING PERIODS

*Establishment of Grazing Periods*

The district forester will establish the opening date for year-long periods. He will also establish the shorter grazing periods, but in his discretion may delegate this function to forest supervisors.

*Points to Consider in Fixing Grazing Periods*

Grazing periods will be established for each national forest to meet the general need of the stockmen and to secure economical use of the forage. An endeavor should be made to adjust periods to local conditions and to allow grazing only when the particular range in question can be used to the best advantage without injury to the forest. It is inadvisable to hold stock on winter range or in feed lots after the range within a forest is ready for use, but it is decidedly unwise to allow stock on forest ranges before the feed has well started, or while the range is so wet that the stock will cause injury to both the forage and tree growth. The condition of the range rather than the desires of the applicants must determine the period. Supervisors should recommend periods which secure the best use of the range without damage. They should avoid the establishment of too many periods which create administrative difficulties in grazing supervision.

*Seasonal Periods May Be Shortened Under Term Permits*

For the purpose of forest protection, it may be necessary to shorten in any year the grazing periods allowable under term permits.

### *Special Periods*

When grazing periods have been fixed by the district forester or the supervisor, stockmen will be required to secure permits and pay the fees for the full period. Special periods can be allowed only in cases where the circumstances render such action equitable to the Government and to other stockmen needing range. For example, if a certain range will support 10,000 head of sheep from June 1 to October 31, the issuance of a permit to graze 10,000 head of sheep from July 1 to September 30 means a loss of forage values, a loss of revenue to the Government and a loss of opportunity by others than the permittees to put stock on the range.

### *Monthly Permits.*

Monthly permits will be authorized only where special conditions warrant it. Despite the fact that they may be more convenient to the permittees, there are several factors which render the general issuance of permits on a monthly basis impracticable from an administrative viewpoint. The practice will result in a disregard of the periods of use to which the ranges are naturally adapted, with consequent incomplete utilization, alternate understocking and overstocking, loss of range capacity, loss of control, and loss of revenue. Such permits would necessarily be subject to extension and additional payments would be required. For these reasons monthly permits will not be allowed unless demanded by exceptional conditions.

### *Additional Time Allowance*

The supervisor may allow stock to enter not more

than 15 days in advance of the date fixed for the beginning of a grazing period, or allow it to remain 15 days after the expiration, without additional charge, when the needs of the users demands such action and the condition of the range warrants it. The additional time allowed shall not exceed a total of 15 days during any one grazing period and will not be stated in the permit, but permission to enter before or remain after the regularly established dates will be given either by general notice or by letter written to the applicant. (See instructions under Reg. G-10.)

### *Larger Number for Shorter Period*

Under unusual conditions, where the interests of the range and the stockmen justify such action, a proportionately larger number of stock for a shorter period than the established grazing period may be allowed, provided the period is shortened at the beginning rather than at the end.

### *Extension of Permits*

If suitable range is available within the national forest, grazing permits for short periods may be canceled and extended permit issued for any of the longer periods established for the forest.

### *Protection of Short Period Permittees*

If the stock which graze in common upon a single grazing unit are covered by permits for different periods so that a portion enter the range considerably in advance of the balance, a reasonable proportion of the unit should be designated as the early range. The stock



which enter first should be confined to the part so designated until the beginning of the last or shorter period, after which the entire unit may be used in common by all stock allotted to it.

## COUNTING STOCK

### *Procedure*

When an owner who has a permit is ready to drive in his stock he may be required to notify the nearest forest officer by mail or otherwise, of the number to be driven in. If called upon to do so, he must provide for having his stock counted before entering a national forest, or at any time afterwards when the number of stock appears to be greater than the number covered by the permit.

The judgment of forest officers making counts of stock of uncertain age shall be conclusive in making allowances for exemptions under Regulation G-2.

### *When Unnecessary*

Where the local forest officers are in possession of reliable information that the number of stock being brought in by a permittee is not in excess of his permit number, counting may be dispensed with.

### *Counting Report*

A report on stock counted (Form 874-18) will be sent to the supervisor when he may require it.

### *Stock in Excess of Permit Number*

Slight discrepancies from the number covered by permit may be permitted when an exact count is im-

possible. When such count is possible, a slight excess in a large permit may be overlooked or a supplemental application for the excess required.

Ordinarily an excess of 1 per cent may be ignored. If the range is heavily stocked, any greater excess should be removed from the herd before it is allowed to enter. If the range is not heavily stocked, the excess number may be allowed to remain in the herd if the owner will immediately apply for a supplemental permit for the whole excess.

### *Feed-lot Counts*

Counting in the feed lots can be done at a time when it will interfere little with a ranger's duties. An applicant who refuses to allow his stock to be counted in a feed lot may be required to arrange for a count before entering the forest, or to round up at any time thereafter if the supervisor has reason to believe that the number being grazed is in excess of the permitted number.

### *Round-ups*

A count of the permittee's cattle on the range is a difficult and expensive matter. Consequently special round-ups for counting should be avoided unless absolutely necessary and wherever possible the number ascertained by other methods.

Regular beef, calf, or general round-ups inaugurated by the stockmen themselves should in no way be under the control of the Forest Service. Forest officers detailed to accompany a round-up will give first attention

to their work, which is to determine the numbers of permitted stock. They should, however, help the stockmen where they can and avoid unnecessary disregard of the authority of the person in charge of the work.

### *Calf Tally*

Under ordinary conditions of range stock raising, four times the number of calves branded in an average year will approximate the total number of stock the owner has, from yearling up. To illustrate, if a man brands 100 calves in a normal season, it is probable that he has about 400 head of cattle, counting yearlings and beef on the range. The calf tally multiplied by 5 will give the approximate number of stock the owner will have on the range in the following year, less the number of head sold and lost.

### *Sale Records*

The record of stock sold and slaughtered, which may be obtained usually from the State livestock board and checked by railroad records when the stock is shipped from railroad points, will furnish a close check on the number of stock a permittee is grazing, provided he is not selling stock raised by other users of the range. When stock is grazed on a forest during the entire year, the supervisor may require permittee to furnish satisfactory evidence of the removal of a number of stock equal to the natural increase.

## HANDLING OF STOCK

Reg. G-13. Forest officers shall require methods of handling stock on the national forests designated to

secure proper protection of the resources thereon and dependent interests, and may require the owners of livestock to give good and sufficient bond to insure payment for all damage sustained by the Government through violation of the regulations or the terms of the permit.